LIBRARY
SUPREME COURT, U. S.
FILED
MAR 3 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1095

MARION G. DENTON,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

ROBERT H. REITER
1317 F Street, N.W.
Washington, D.C. 20004

CLAUDE M. HARDEN, JR.
203 South Florida Avenue
Lakeland, Florida 33801

JOHN H. SPAULDING
1317 F Street, N.W.
Washington, D.C. 20004

Attorneys for Petitioner

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

INDEX

	Page
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	9
APPENDIX A – Opinion of the United States Court of Claims	1a
APPENDIX B – Statutory Appendix	13a
Exhibit A	16a
Exhibit B	17a
Exhibit C	18a
Exhibit D	20a
Exhibit E	21a
Exhibit F	22a

AUTHORITIES CITED

Cases:

Chase Securities Corp. v. Donaldson, 325 U.S. 304	6
McIver v. Ragan, 2 Wheat. 25	6
2 Wheat. 25	6
Metropolitan Railway Company v. District of Columbia, 312 U.S. 1	6

Page

Scott v. Shreeve,
12 Wheat. 605 6

United States v. Marion
404 U.S. 307 6

United States v. St. Paul, M. & M. Railway Co.,
247 U.S. 310 6

Statutes:

10 U.S.C. 804(c) 8, 13a
10 U.S.C. 875(c) 8, 13a
10 U.S.C. 1552 . . . . . 6, 13a
28 U.S.C. 2501 . . . . . 15a

Miscellaneous:

Legislative Reorganization Act of 1946 . . . . . 15a

Hearings on H.R. 1181, House Committee on Armed
Services, 82nd Cong., 1st Sess., p. 446 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

MARION G. DENTON,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

OPINION BELOW

The opinion of the United States Court of Claims, dated April 17, 1974, is officially reported at 204 Ct. Cl. 188, and is set forth in Appendix A.

JURISDICTION

The judgment of the court below was entered on April 17, 1974. Timely motion for rehearing was filed, and de-

nied on October 4, 1974. The Chief justice extended the time for filing petition for writ of certiorari to and including March 3, 1975. Jurisdiction to review this judgment is conferred on this Court by Title 28, Section 1255(1), of the United States Code.

QUESTIONS PRESENTED

1. Where a suit is begun in the United States Court of Claims based upon the failure of a military correction board to grant full relief under the statute requiring it to do so, can the court in applying the statute of limitations begin the running of the statute from the date of a decision of the board on a previous application, particularly when the board itself denominates its decision as being on reconsideration?

2. Can a military correction board, on a finding that a serviceman was improperly court-martialed, sentenced and discharged, order the issuance of a new discharge to be pre-dated to a date eighteen years previous to the date of the board's decision?

STATEMENT OF THE CASE

Petitioner, a major in the United States Air Corps Reserve, was ordered to active duty in 1941, and after a period of service in the Continental United States, received a Presidential Order ordering him to be assigned as Post Commander of the Greenland Base Command, and upon arrival there to assume command. Thereupon, he traveled to Greenland and reported to the officer then in command, who requested that he remain there pending clarification, and thereafter without advance notice ordered petitioner to one of the outlying stations of the Greenland Command. Petitioner protested that this was not in accord-

ance with his orders, which were to take command of the Greenland Command, and thereupon the Post Commander preferred charges against petitioner for violation of the 64th Article of War – willful disobedience of an order of a superior officer – and placed petitioner under arrest. Petitioner was court-martialed, convicted, and sentenced to dismissal, forfeiture of pay and allowances, and confinement to hard labor for twelve years. The sentence was approved by the convening authority, but the President of the United States remitted the forfeiture and confinement.

An investigation was made by the House Committee on Military Affairs, which concluded that a miscarriage of justice had occurred, and recommended that the verdict and sentence of the court-martial be disapproved and petitioner be restored to his former status. On September 24, 1953 petitioner applied to the Air Force Board for Correction of Military Records for the facation of the findings and sentence of his court-martial. This was denied. In 1973 another application was made, requesting the same relief, and after a hearing granted by the Board, a recommendation was made and approved by the Assistant Secretary of the Air Force, on March 19, 1964, that the findings and sentence be set aside, and all rights, privileges and property of which petitioner was deprived by virtue thereof be restored, that petitioner's military record be corrected to show his release from active duty on September 2, 1945, and that all appropriate and necessary action be taken in consonance with that directive.

In 1965 petitioner made a further application for correction of his military record, requesting that the previous order be amended to provide specifically for service beyond September 2, 1945, and for promotions thereafter. Following a hearing, the Board recommended, and

the Undersecretary of the Air Force directed on October 4, 1966, that petitioner's military record be corrected to show that he was not released from active duty on September 2, 1945, and instead that he was placed on ninety days' terminal leave effective that date, that he was promoted to lieutenant colonel effective November 1, 1945, and reverted to inactive status on December 2, 1945, appointed colonel in April 1953, and was retired in that grade on November 30, 1956 with entitlement to retired pay. Petitioner received payment based upon such correction on April 25, 1957 and thereafter based upon his retired status. On October 24, 1966, he was tendered a reserve appointment in the Air Force.

On August 17, 1972, petitioner filed a petition in the court below seeking judgment for back pay, allowances and other emoluments as a major in the Air Force Reserve from September 2, 1945 to March 19, 1964, and retirement pay and emoluments as a retired colonel in the Air Force Reserve since March 19, 1964, on the ground that the decision of the Undersecretary of the Air Force dated October 4, 1966, was arbitrary and illegal, and that neither the Correction Board nor the Secretary had the power to back-date an officer's release from active duty. The Government filed a motion for summary judgment, which the court granted on the ground that petitioner's claim was barred by the statute of limitations. The court indicated further that petitioner could not claim that the Correction Board acted arbitrarily by back-dating his discharge.

REASONS FOR GRANTING THE WRIT

The first issue sought to be raised by this petition is whether, by filing more than one application for correc-

tion of his military record, a serviceman is subject for purposes of seeking court review of the decision of a correction board to the running of the statute of limitations from the date of the decision of the board on his earlier application, although he later seeks additional relief which was not previously granted; and this irrespective of the date of the decision on the later application. This issue is important to the administration of federal law, in that it affects the availability of relief under the provisions of the Legislative Reorganization Act of 1946 establishing the correction board procedure in lieu of private relief legislation. The court below has established a precedent, unsupported by the statutory language, legislative history, or precedents in this Court, restricting and in some cases even eliminating the possibility of servicemen's obtaining the judicial review of the correction boards' determinations which the law provides.

The consequences of the rule established by the court below can be judged to some extent by the fact that during the first five years of their operation, the military correction boards processed over 15,000 applications, acting favorably on approximately 1,400. Hearings on H.R. 1181, House Committee on Armed Services, 82nd Cong., 1st Sess., p. 446.

The opinion of the court below promulgates criteria for the application of the statute of limitations in correction board review cases which are extremely difficult to understand, and a layman who might find his right of review jeopardized would be unable without consulting trained counsel to know his rights. In something as basic as limitations, clarity is at least as important as correctness, and a reading of the opinion of the court below will servie to indicate theproblem created by the complexity of the court's analysis.

If such a complicated rule were made necessary by the language of the statute or the legislative history, perhaps it could be justified, but the court cites no statutory language or background to support its position. On the contrary, it is in direct contradiction to the clear Congressional intent to make the relief provisions as broad and nontechnical as possible, without limits as to the manner of the boards' consideration of applications or judicial review (10 U.S.C. § 1552, appended hereto as Appendix B).

This Court held early in its history that the statute of limitations is not to be automatically invoked, the position of the one attempting to plead it being important. *Scott v. Shreeve,* 12 Wheat. 605. It is not intended as a punishment, but to protect those who rely on rights. *McIver v. Ragan,* 2 Wheat. 25. It finds justification in necessity and convenience rather than logic, and represents expediency rather than principles, not being a "fundamental" or "natural" right, and being subject to a great deal of legislative control. *Chase Securities Corp. v. Donaldson,* 325 U.S. 304. Its purpose is for the respose of society and in order to protect those who may eventually lose their means of defense. *United States v. Marion,* 404 U.S. 307. In contrast, where the objects of a law are beneficent, it should be liberally construed. *Metropolitan Railway Co. v. District of Columbia,* 312 U.S. 1, and this includes legislation as to which the bar of limitations is attempted to be applied. *United States v. St. Paul, M. & M. Railway Co.,* 247 U.S. 310.

The court below, in determining the date on which the statute of limitations began to run, selected the date of the previous 1963 decision of the Correction Board, granting relief to the petitioner including, in general terms, restoration of his rights. The court based this on two fac-

tors (1) petitioner's not having specifically sought monetary benefits in his earlier application (although the statute itself provides for such relief when the correction of record is made), and (2) the board's having incorrectly treated the second application as a reconsideration, considered by the court to have been ineffective in tolling the period of limitations.

It is established that the court below has jurisdiction to review determinations of military boards when incomplete relief is granted, so that the question is specifically the date of accrual of the cause of action in such cases, for purposes of applying the statute of limitations for bringing action in the court below. What the court below has done is to apply artifical reasoning to the application of the doctrine of limitations, not only lacking legislative support, but contrary to the philosophy of Congress as implemented by the boards themselves. In this case, for example, the Board denominated its consideration of petitioner's application the review of which is sought in this proceeding, and its decision thereon, as reconsideration. However, the court below did not consider the Board's position in this respect as binding or merited, or that estoppel or any other equitable consideration prevented the Goverment from taking a contrary position in this action.

The position of the petitioner is strengthened by the efforts by the Department of Defense to carry out this liberal attitude on limitations, as indicated in a series of communications received by the petitioner, copies of correspondence being appended hereto as Exhibits A, B, C and D, including a specific inquiry made by respondent. Reliance on such a position is a consideration which should be considered in determining the applicability of limitations.

It is also notable that as a result of the action of the Correction Board in granting partial relief, petitioner became entitled to the restoration of his commission, which was tendered to him on October 24, 1966, per Exhibits E and F appended hereto, so that a separate basis for relief is for pay following such restoration. Cf. 10 U.S.C. sections 804(c) and 875(c), set fotth in Appendix B hereto. Cf. *Pratt v. Pratt,* 96 U.S. 704, where the Court held that laches could not be interposed where no cause of action yet existed.

As to the second issue, the propriety of pre-dating releases from duty, the court below has established the doctrine that if a serviceman is found to have been discharged or released through an illegal action, he is considered as continuing on duty for pay purposes as well as promotions. *Egan v. United States,* 141 Ct. Cl. 1. Still the military services have adopted the practice in such cases of issuing new discharges pre-dated to much earlier dates as they have done in the present case. The effect is to deprive the person injured by reason of the invalid action of benefits which would have accrued to him during the period between such action and the determination of its invalidity, despite the principle that a man is to be treated under such circumstances as if the invalid action had never taken place.

In the present case, although the petitioner was found in 1963 to be entitled to have his court-martial set aside, his release from active duty was dated 1945, so that the benefits of his active duty status, which would of course be reduced by his actual earnings for the period between 1945 and 1963 were denied him. Although the court below speculated that he would have been released at an earlier date, the fact that he could have very well remained

on active duty was nowhere mentiond by the court. Both the court below and other federal courts have held that an improperly released serviceman is entitled to the pay he would have received except for the release. The position of the court below in this case is inconsistent with those holdings, and has the effect of depriving servicemen in the position of the petitioner of valuable property rights to which they are legally and justly entitled.

CONCLUSION

In light of the statutory language and purpose, as carried out by the Department of Defense generally and in this particular case, the imposition of the bar of the statute of limitations in cases involving successive applications for relief to military correction boards is inconsistent with the entire background of the establishment of the correction boards, and the prior holdings of this Court. It serves to discourage administrative adjudications for the purpose of securing the complete relief specifically provided by Congress, and requiring resort to court action irrespective of the reconsideration available before the boards. It confuses and complicates what was intended to be a simplified procedure, and to require the utilization of judicial procedures, with the accompanying requirements of legal assistance, in what are essentially administrative matters, and establishes a rule which is beyond the comprehension of the layman. Before permitting such a rule to become law, this Court should take this opportunity to review the basis for the resulting departure from existing principles. Further, the propriety of back-dating of military

personnel actions based upon the determination of invalidity of discharges and releases should be considered. This case presents an ideal opportunity for such review.

Respectfully submitted,

ROBERT H. REITER,
1317 F. Street, N.W.
Washington, D.C. 20004

CLAUDE M. HARDEN, JR.
203 South Florida Avenue
Lakeland, Florida 33801

JOHN H. SPAULDING
1317 F. Street, N.W.
Washington, D.C. 20004

APPENDIX A

In the United States Court of Claims

No. 319-72

(Decided April 17, 1974)

MARION G. DENTON v. THE UNITED STATES

Alan Woods, attorney of record for plaintiff. *William R. Baesman* and *Rodden and Woods*, of counsel.

Rose E. Adewale-Mendes with whom was *Acting Assistant Attorney General Irving Jaffee*, for defendant.

Before DAVIS, SKELTON, and NICHOLS, *Judges*.

ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

SKELTON, *Judge*, delivered the opinion of the court:

On August 19, 1944, the plaintiff, Marion G. Denton, while holding the rank of major, was released from active duty and dismissed as an officer in the United States Army Air Corps Reserve, pursuant to a general court-martial. Nine years later, on September 24, 1953, he applied to the Board for Correction of Military Records for a correction of his military record. Item seven of the plaintiff's application contained his complete request for relief, and read in full as follows:

> 7. I request the following correction of record (State the exact record for which a correction is requested and in what particular)
>
> Vacation of findings and sentence of general court martial convened at Mitchell Field, New York, 27 September 1943, pursuant to Special Orders 234, 24 Au-

gust 1943, and 266, 25 September 1943, Headquarters First Air Force.

The Correction Board denied the application.

In 1963, the plaintiff again requested the Air Force Board for the Correction of Military Records to correct his military records. The application before the Correction Board in 1963, including the request for relief, was exactly the same as the application filed by the plaintiff in 1953, which is quoted above. The Board conducted a hearing on May 1, 1963. Thereafter, pursuant to recommendations by the Chairman of the Air Force Board for the Correction of Military Records, the Assistant Secretary of the Air Force, on March 19, 1964, directed that the findings and sentence of plaintiff's court-martial be "set aside so that all rights, privileges, and property of which said member [plaintiff] may have been deprived by virtue of the findings, sentence and execution thereof, be restored." He also directed that plaintiff's military records be corrected to show that the plaintiff was released from extended active duty *due to demobilization* effective September 2, 1945; and he ordered that all necessary and appropriate action be taken in consonance with his directive.

On November 30, 1965, the plaintiff again applied for correction of his military records. As may be seen below, this application requested relief that was new and different from that requested in 1953 and 1963. His 1965 application requested relief as follows:

> The order of the Board of 19 March 1964 providing that "* * * all rights, privileges, and property of which said member may have been deprived * * * be restored." be specifically amended to provide service beyond 2 Sept. 1945, and on determination of such date terminal promotion to Lieut. Colonel be provided, and to Colonel on 1 April 1953, and to Brigadier General on 30 November 1956.
>
> Pay
>
> 1. Active duty pay from 19 Aug 1944 to separation date.
> 2. Drill pay as Lieut. Colonel from separation date to 1 April 1953.
> 3. Drill pay of Colonel from 1 April 1953 (date all reserve officers were tendered new commissions) to 29 November 1956.

4. Accrued leave of 90 days on determined separation date.

Points

All points earnable for retirement from separation date to 29 November 1956.

* * * * *

It is important to note that the relief requested in this 1965 application was not requested in plaintiff's 1953 or 1963 applications *as it could have been.*

After a hearing, the Board recommended that corrections be made to the plaintiff's military records. On October 4, 1966, the Undersecretary of the Air Force directed that plaintiff's records be corrected as follows:

MEMORANDUM FOR THE CHIEF OF STAFF

Having received and approved the recommendations of the Air Force Board for the Correction of Military Records and under authority of Section 1552, Title 10, United States Code (70A Stat. 116), it is directed that:

1. The pertinent military records of the Department of the Air Force, relating to MARION G. DENTON, 0–150 432, be corrected to show that he was not released from extended active duty on 2 September 1945.
2. The pertinent military records of the Department of the Air Force, relating to MARION G. DENTON, 0–150 432, be corrected to show that he was authorized and placed on 90 days terminal leave effective 2 September 1945.
3. The pertinent military records of the Department of the Air Force, relating to MARION G. DENTON, 0–150 432, be corrected to show that he was eligible for promotion under the terminal leave promotion policies in effect and promoted to grade of Lt. Colonel, Air Reserve, Officer Reserve Corps, effective 1 November 1945.
4. The pertinent military records of the Department of the Air Force, relating to MARION G. DENTON, 0–150 432, be corrected to show that he was relieved from extended active duty due to demobilization, effective 2 September 1945 and reverted to inactive status on 2 December 1945.
5. The pertinent military records of the Department of the Air Force, relating to MARION G. DENTON, 0–150 432, be corrected to show that he was promoted

to grade of Colonel, Reserve of the Air Force, effective 31 March 1953.

6. The pertinent military records of the Department of the Air Force, relating to MARION G. DENTON, 0–150432, be corrected to show that he was tendered an indefinite term appointment as Colonel, Reserve of the Air Force on 1 April 1953, and that he accepted the appointment on the same date.
7. The pertinent military records of the Department of the Air Force, relating to MARION G. DENTON, 0–150 432, be corrected to show that he accrued 35 Inactive duty points and 15 Gratuitous points for a total of 50 points during each of the following periods; and that each period is a satisfactory year of Federal service for retirement purposes:

   1 July 1949 to 30 June 1950
   1 July 1950 to 30 June 1951
   1 July 1951 to 30 June 1952
   1 July 1952 to 30 June 1953
   1 July 1953 to 30 June 1954
   1 July 1954 to 30 June 1955
   1 July 1955 to 30 June 1956

8. Upon submission of an appropriate application, the pertinent military records of the Department of the Air Force relating to MARION G. DENTON, 0–150 432, be corrected to show that he retired in grade of Colonel, Reserve of the Air Force, under the provisions of Section 1331, Title 10, USC, on 30 November 1956, with entitlement to retired pay effective 1 December 1956.
9. All necessary and appropriate action be taken in consonance with this Directive.

On April 25, 1967, the plaintiff received $42,511.57 as payment for sums due him as a result of the corrections to his records. Since October 1966, he has been receiving monthly retirement checks.

On August 17, 1972, the plaintiff filed a petition in this court seeking a judgment against the United States for the following: (1) back pay, allowances, and all other emoluments of a major in the United States Air Force Reserve on active duty from September 2, 1945, to March 19, 1964; (2) back retirement pay and all other emoluments due a retired colonel in the United States Air Force Reserve from March 19, 1964, to the date of judgment; and (3) an order to the defendant to pay plaintiff as a retired colonel in the

United States Air Force Reserve. The case comes to us on cross motions for summary judgment, and is ready for disposition on those facts which are undisputed.

The plaintiff contends that the October 4, 1966, decision by the Undersecretary of the Air Force was arbitrary and contrary to law. He argues that neither the Correction Board nor the Secretary of the Air Force has the power to backdate a reserve officer's release from active duty. Therefore, he asserts that as a matter of law he remained on active duty from the date of his wrongful discharge until March 19, 1964, when he was discharged by corrective action. Alternatively, the plaintiff contends that even if power exists to take corrective action by backdating a release, the use of such power in this case constitutes an arbitrary and capricious abuse of discretion.

The defendant asserts that the plaintiff's cause of action is barred by the statute of limitations. It also contends that the plaintiff's failure to present his claim before the Correction Board bars his action in this court. Alternatively, the defendant maintains that the Air Force Board acted within its power and discretion in backdating the plaintiff's release from active duty.

The statute of limitations, 28 U.S.C. § 2501 (1970), bars any claim "unless the petition thereon is filed within six years after such claim first accrues." In *DeBow* v. *United States*, 193 Ct. Cl. 499, 503, 434 F. 2d 1333, 1335 (1970), *cert. denied*, 404 U.S. 846 (1971), we reaffirmed our earlier holdings "that a claimant can often found a new cause of action, or a 'continuing' claim, upon a [first] favorable determination by the Correction Board (or comparable military tribunal) where that determination stops short of giving the full relief it was compelled in law to grant *on the presentation then made*." [Emphasis supplied.] The instant case involves two Correction Board determinations which were favorable, in the sense that some relief was granted to the plaintiff in both Board decisions. The Assistant Secretary of the Air Force acted on the first favorable determination on March 19, 1964, more than six years before August 17, 1972, the date on which the plaintiff filed a petition in this court. So, the first issue in this case is whether or not the plaintiff

can successfully claim that his cause of action arose on October 4, 1966, the date on which the Undersecretary of the Air Force acted on the *second* favorable determination. If not, his claim is barred by limitations.

We held in *DeBow* that a major reason for allowing a cause of action to be based on an initial favorable administrative determination, that would otherwise be barred by limitations, is that once an administrative body decides relief is proper on the claim and presentation then made, it should not be free to illegally or arbitrarily award less relief than that requested by the claimant in that proceeding. In the context of the correction of a military record, this means that once a discretionary decision is made to correct a record, the grant of appropriate money relief is not discretionary but automatic. *Ray* v. *United States*, 197 Ct. Cl. 1, 453 F. 2d 754 (1972). If appropriate payment is not then made, a cause of action accrues in this court at that time. *Ray*, *supra*. In this case, however, the appropriate payment has been made and plaintiff seeks only a new discretionary correction of his record. In these circumstances, the 1966 record correction is a nullity so far as concerns the accrual of a cause of action and whatever cause plaintiff has accrued in 1964 or earlier, and is now time barred.

The plaintiff contends that we should not consider the 1964 decision by the Correction Board final for the purposes of the statute of limitations because the 1965–1966 proceedings involved a reopening of the 1964 decision. This court has held that an administrative body's reopening of an earlier decision may, under certain circumstances, deprive that decision of finality for limitations purposes until a subsequent decision is reached. *Schiffman* v. *United States*, 162 Ct. Cl. 646, 319 F. 2d 886 (1963); *Friedman* v. *United States*, 159 Ct. Cl. 1, 310 F. 2d 381 (1962) *cert denied*, 373 U.S. 932 (1963); *Capps* v. *United States*, 133 Ct. Cl. 811, 137 F. Supp. 721 (1956). However, in *Robinson* v. *United States*, 163 Ct. Cl. 235, 237 (1963), we further explained those cases by saying "[t]he 'reopening' to which *Friedman* refers (see p. 16, 310 F. 2d at 391) is of the kind which was present in *Capps* v. *United States*, * * * and *Schiffman* v. *United States*, * * *—where the service itself moved to accord the

plaintiff a new hearing on the basis of a new regulation or interpretation of the law." Under this approach, the fact that the parties and Correction Board call the new proceedings a "reopening," as they did in the instant case, has no effect on whether or not the proceedings are the type of reopening which tolls the running of limitations. In the case at bar, rather than the Air Force moving to accord the plaintiff a new hearing, the plaintiff himself requested new proceedings. Additionally, there was no change in regulations or interpretation of the law between the 1964 decision and the request for new proceedings in 1965. Therfore, the 1964 decision was not "reopened" by the later proceedings in any manner that affects the running of the limitations period.

We know of no reason why the 1965–1966 proceedings involved in the instant case should be held to bar the 1964 decision of finality. In 1964, the plaintiff received all the relief he had requested in his application to the Correction Board. He requested no more than a vacation of the findings and sentence of his general court-martial of 1943, and that is exactly what he received. None of the relief requested by the plaintiff's 1965 application to the Correction Board was requested, as it could have been, in his 1963 application. We see no reason why proceedings initiated by an application for entirely new relief, which could have been requested prior to an earlier favorable decision, should deprive the earlier decision, which granted all the relief requested, of finality. Therefore, the 1964 decision was final for the purpose of beginning the limitations period.

The plaintiff's 1965 claim before the Correction Board grew out of the same transaction or occurrence, the findings and sentence of the general court-martial of 1943, as his 1963 claim. Additionally, all the relief requested by the plaintiff in 1965 could have been requested in 1963. In other words, during the time between the two applications, no change occurred in the facts, or law, which was relevant to the plaintiff's right to recover. Therefore, as the discussion above indicates, the 1966 favorable decision by the Correction Board and the Undersecretary did not affect the running of the limitations period which began with the 1964 favorable determination. Since the plaintiff filed his petition in this court

more than six years after the 1964 decision, his claim is barred by our statute of limitations.

Even if the plaintiff could base his cause of action on the 1966 decision by convincingly arguing that the 1964 decision was not final, which he cannot, he still could not prevail. When the plaintiff filed his application with the Correction Board in 1965, he did not request either a discharge as of March 19, 1964, or active duty pay for the period from September 2, 1945, until March 19, 1964, both of which he is claiming in the instant suit. His active duty pay claim before the Board in 1965 covered only the period from August 19, 1944, until his separation date. Since he requested drill pay from his separation date until April 1, 1953, his application indicates that at most he claimed that his separation date should be after September 2, 1945, and sometime before April 1, 1953; and that he should receive active duty pay for the period ending on such separation date. The plaintiff does not contend that at any time during the 1965–1966 proceedings he attempted to extend his claim beyond what he indicated in his application. As can be seen, the claim he asserted during the 1965–1966 proceedings was very different from his claim here that the Correction Board's lack of power to backdate his discharge entitles him to active duty pay for the period from September 2, 1945, until March 19, 1964.

Although a claimant may be able to base a cause of action upon a Correction Board's favorable determination, this court plainly held in *DeBow* that a plaintiff may not use a "beneficial administrative determination as a springboard to obtain relief (within the Board's jurisdiction) which he disowned before the Board itself, or never sought from it, explicitly or implicitly." [193 Ct. Cl. at 503, 434 F. 2d at 1335.] In *DeBow*, we dismissed the plaintiff's petition because he asked for relief which he had not sought before the Correction Board. The only events, other than the Correction Board action, on which he could base his claim were barred by the statute of limitations.

We believe the *DeBow* holding applies to the instant case. As we indicated in *DeBow*, a favorable Board determination can be used as the basis for a cause of action only when the claimant's contentions before the Correction Board should

have put the Board on notice as to the nature of the claim later asserted in this court. A claimant should not be allowed to avoid the usual limitations bar by contending that a Correction Board acted arbitrarily or illegally by failing to approve a claim of which the Correction Board never had notice. In the case at bar, the plaintiff failed to put the Correction Board on notice as to the nature of the claim he now asserts in this court. This failure is shown above by the considerable difference between the relief sought in the plaintiff's 1965 application to the Correction Board and the relief sought in the plaintiff's petition in this court. Therefore, the plaintiff may not base his cause of action on the 1966 decision by the Correction Board and the Undersecretary of the Air Force. Since all events on which the plaintiff could possibly base his cause of action occurred more than six years before he filed his suit in this court, and since he claims relief here he never claimed before the Board, he has no basis for a cause of action in this court.

Even if we assume arguendo that the plaintiff put the Correction Board on notice as to the nature of his claim in this court, and that he can escape the limitations bar, he still cannot prevail. 10 U.S.C. § 1552 (1970)[1] grants to the Secretary, acting through the Correction Board, the power to correct records when a correction is necessary to rectify an error or remove an injustice. In *Kimmel* v. *United States*, 196 Ct. Cl. 579 (1971), this court held that section 1552 entitles a complainant to nothing more than placement in the same position he would have been had no error been made. The plaintiff in the instant case has indicated no purpose of the statute, and we know of no purpose, that would be better served if the Correction Boards were required to grant more relief than that stated in *Kimmel*.

The task of removing the injustice of an improper discharge or release can best be accomplished, and the purpose of the statute best effectuated, if the Correction Boards

[1] 10 U.S.C. § 1552 (1970) reads in pertinent part as follows:
"§ 1552. Correction of military records: claims incident thereto.
"(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. * * *"

(more correctly, the Secretaries acting through the Correction Boards) have considerable discretion to apply their expertise to the varying situations they confront. Many factors, such as the needs of the armed services and the characteristics of the particular individual involved, can affect the date on which a serviceman would have been discharged had an improper discharge never occurred. In a case such as the one at bar where the original discharge is not invalidated until many years after it occurred, such factors certainly might indicate that the complainant would have been discharged prior to the invalidation date. Therefore, we think the discretionary power granted to the Correction Boards by section 1552 includes the power to backdate discharges where such backdating places the claimant where he likely would have been absent the improper discharge. In fact, this court has previously approved the backdating of discharges and releases by Correction Boards. *O'Callahan* v. *United States*, 196 Ct. Cl. 556, 451 F. 2d 1390 (1971); *Mercercau* v. *United States*, 155 Ct. Cl. 157 (1961).

In several previous cases involving officers in the armed forces, this court held that Correction Boards acted improperly by backdating discharges. *Hamlin* v. *United States*, 183 Ct. Cl. 137, 391 F. 2d 941 (1968); *Motto* v. *United States*, 172 Ct. Cl. 192, 348 F. 2d 523 (1965); *Egan* v. *United States*, 141 Ct. Cl. 1, 158 F. Supp. 377 (1958). The plaintiff contends that these cases support his position in the instant case. However, all of these cases are decisively distinguishable from the case at bar.

All of these cases except *Egan* involved regular officers in the armed forces. Regular officers possess indefinite commissions, and, therefore, their status in the armed forces is different from the status of other personnel. *O'Callahan* v. *United States*, 196 Ct. Cl. at 560, 451 F. 2d at 1392, and cases cited therein. Reserve officers do not possess indefinite commissions. With exceptions not relevant to the instant case, reserve officers, such as the plaintiff, can be released from active duty at any time under 10 U.S.C. § 681(a) (1970).[2] We know of nothing which indicates that the status

[2] 10 U.S.C. § 681(a) (1970) provides in pertinent part as follows:
"§ 681. Reserves: release from active duty.
"(a) Except as otherwise provided in this title, the Secretary concerned may at any time release a Reserve under his jurisdiction from active duty."

of reserve officers was any different on the date to which the plaintiff's release was backdated. So, while regular officers may be able to successfully attack the backdating of a discharge as contrary to law, section 681(a) prevents reserve officers from succeeding in such a broad attack.

Even though *Egan* involved a reserve officer, this court has previously distinguished that case from cases such as the one at bar. In *Merriott* v. *United States*, 163 Ct. Cl. 261, 265 (1963), *cert. denied*, 379 U.S. 838 (1964), we stated as follows:

> * * * In *Egan*, the officer was illegally and erroneously released to inactive duty in October 1943, and then illegally discharged from the Marine Corps Reserve in April 1944, on the ground that he was insane (which he was not); if the true facts had been known it would have been highly unlikely that a healthy Marine Corps combat officer would have been released in the very midst of World War II; in fact, no reason for such a release at that time appeared in the record * * *.

Because the record in *Egan* indicated no reason or basis for backdating the release to the selected date, the Correction Board's action was found to be arbitrary and was not allowed to stand.

In the instant case, the Correction Board did not act arbitrarily in backdating plaintiff's release. The release was backdated to a date near the end of World War II, a time when many reserve officers were released from active duty because they were no longer needed. This court approved a similar release in *Merriott* where an Army Disability Review Board found that the plaintiff in that case had been improperly released from active duty on January 1, 1945, *by reason of physical disability*. Even though the Review Board reversed the earlier finding that the plaintiff in *Merriott* was incapacitated for active duty, it refused to grant any relief, and, therefore, left the plaintiff's release date at January 1, 1945. In refusing to find that the Review Board acted arbitrarily, we said that the plaintiff obtained a release which "came too close to the end of World War II for the court to speculate that, unlike millions of other reservists, he would have been kept on active duty." [163 Ct. Cl. at 264.] As

with the plaintiff in *Merriott*, the plaintiff in the instant case received a release as of a date reasonably related to the events surrounding that date. Therefore, he cannot successfully claim that the Correction Board acted arbitrarily by backdating his claim.

For the reasons stated above, the defendant's motion for summary judgment is granted, the plaintiff's motion for summary judgment is denied, and plaintiff's petition is dismissed.

APPENDIX B
STATUTORY APPENDIX

10 U.S.C. 804(c)

(c) If a discharge is substituted for a dismissal under this article, the President alone may reappoint the officer to such commissioned grade and with such rank as, in the opinion of the President, that former officer would have attained had he not been dismissed. The reappointment of such a former officer shall be without regard to the existence of a vacancy and shall affect the promotion status of other officers only insofar as the President may direct. All time between the dismissal and the reappointment shall be considered as actual service for all purposes, including the right to pay and allowances.

10 U.S.C. 875(c)

(c) If a previously executed sentence of dismissal is not imposed on a new trial, the Secretary concerned shall substitute therefor a form of discharge authorized for administrative issue, and the commissioned officer dismissed by that sentence may be reappointed by the President alone to such commissioned grade and with such rank as in the opinion of the President that former officer would have attained had he not been dismissed. The reappointment of such a former officer shall be without regard to the existence of a vacancy and shall affect the promotion status of other officers only insofar as the President may direct. All time between the dismissal and the reappointment shall be considered as actual service for all purposes, including the right to pay and allowances. Aug. 10, 1956, c. 1041, 70A Stat. 63.

10 U.S.C. 1552

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of the Treasury may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

(b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor

before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later. However, a board established under subsection (a) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

(c) The department concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be. If the claimant is dead, the money shall be paid, upon demand, to his legal representative. However, if no demand for payment is made by a legal representative, the money shall be paid—

(1) to the surviving spouse, heir, or beneficiaries, in the order prescribed by the law applicable to that kind of payment;

(2) if there is no such law covering order of payment, in the order set forth in section 2771 of this title; or

(3) as otherwise prescribed by the law applicable to that kind of payment.

A claimant's acceptance of a settlement under this section fully satisfies the claim concerned. This section does not authorize the payment of any claim compensated by private law before October 25, 1951.

(d) Applicable current appropriations are available to continue the pay, allowances, compensation, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who, because of the correction of his military record, is entitled to those benefits, but for not longer than one year after the date when his record is corrected under this section if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate. Without regard to qualifications for reenlistment, or appointment or reappointment, the Secretary concerned may reenlist a person in, or appoint or reappoint him to, the grade to which payments under this section relate.

(e) No payment may be made under this section for a benefit to which the claimant might later become entitled under the laws and regulations administered by the Administrator of Veterans' Affairs.

(f) The Secretary of Defense for the military departments, and the Secretary of the Treasury for the Coast Guard, shall report to Congress every six months on claims paid under this section during

the period covered by the report. The report shall include for each claim the name of the claimant, a brief description of the claim, and a statement of the amount paid. Aug. 10, 1956, c. 1041, 70A Stat. 116.

28 U.S.C. 2501

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Every claim under section 1497 of this title shall be barred unless the petition thereon is filed within two years after the termination of the river and harbor improvements operations on which the claim is based.

A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

A suit for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the General Accounting Office fails to act within six months after receiving the account. June 25, 1948, c. 646, 62 Stat. 976; Sept. 3, 1954, c. 1263, § 52, 68 Stat. 1246.

EXHIBIT A

HEADQUARTERS
AIR RESERVE RECORDS CENTER
UNITED STATES AIR FORCE
3800 YORK STREET
DENVER, COLORADO 80205

REPLY TO ATTN OF: RPCS-321

1 AUG 1964

SUBJECT: DENTON, Marion G. AO 15 04 32, Retirement

TO: Mr. Marion G. Denton
205 Denton Avenue
Auburndale, Florida

1. The statute of limitations requires that a claim must be filed within 10 years from the first date eligibility was attained. You attained eligibility on 30 November 1956, the end of the month in which you reached age 60.

2. Since your records were corrected to show release from extended active duty effective 2 September 1945, your ORC commission remained in effect until 1 April 1953. Prior to 1 July 1949 a reservist is credited with one point for each day of active duty and 50 points for each 365 days not on active duty. After 1 July 1949 an individual is credited with actual points earned in addition to 15 gratuitous points awarded for reserve membership. You have been credited with 56 gratuitous points from 1 July 1949 - 1 April 1953.

3. The attached ARRC Form 33, Statement of Reserve Retirement Service and Point Credit, reflects points and service verified by documents in your master personnel record.

1 Atch
ARRC Form 33

ETHEL F. BOUCHIER, Chief
Retirements Unit I

ADDRESS CORRESPONDENCE TO "AIR RESERVE RECORDS CENTER" - NOT TO INDIVIDUALS
INCLUDE YOUR SERVICE NUMBER

EXHIBIT B

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE ACCOUNTING AND FINANCE CENTER
[illegible]
DENVER [illegible] 80205

REPLY TO ATTN OF: AJC

9 Mar 1967

SUBJECT: Corrected Military Records - Colonel Marion [illegible] Denton, FV 150432, USAF (Retired)

TO: Mr. John J. Corcoran
The American Legion
1608 K Street NW
Wash, DC 20006

RECEIVED
MAR 10 1967
THE AMERICAN LEGION
[illegible]
DAYL OFFICE

1. Reference is made to your recent correspondence in regard to correction of Colonel Denton's military records.

2. You were right in your assumption that check dated 31 Jan 1967 in the amount of $286.91 payable to Colonel Denton was for retired pay due for the month of Jan 1967. The deduction of $177.29 from $886.45 shown on Voucher L-3963 is for withholding tax.

3. In accordance with Public Law 220-82 Congress as pertains to correction of military records, there is no 10 years statute of limitation in regard to payment for claims of this nature. Payment for the amount shown on attached copy of AFAFC Form 640-1 will be made in full to Colonel Denton when funds become available.

4. Funds for correction of records payments are allocated to the Air Force by the Department of Defense. We regret that funds for payment of claims of this nature are not available at present. You may be assured that when funds are made available to the Air Force, payment will be made immediately.

5. We forwarded a copy of AFAFC Form 640-1 to Colonel Denton on 27 Feb 1967.

DEAN P. ROBERTS, Major, USAF
Chief, Claims Division
Directorate of Adjudication

1 Atch
Cy AFAFC Form 640-1

EXHIBIT C

Marion Gray Denton
205 Denton Avenue
Auburndale, Florida
33823

May 5, 1971

Department of The Air Force
Headquarters Air Force Accounting
and Finance Center
3800 York Street
Denver, Colorado 80205

Attention: Claims Division
Directorate of Adjudication

Gentlemen:

The undersigned retiree invites attention to computation of benefits and allowances provided after restoration on 4 October 1958.

Essentially, factors involved are that compliance in keeping with communications dated 24 Oct 1958 AFPMSDC and USA PHPC (AFPMDC), Randolph Air Force Base, Texas 78148, was not provided. Copies of both communications are attached hereto.

Accordingly I wish to make claim and request recomputation and payment for "any pay and allowances which accrue to you for a period of one year from the date of such correction" as follows:

Promotion to Lt. Colonel from 1 November 1948 to 31 March 1953.

Promotion to Colonel on 31 March 1953 to 4 December 1967.

As will be seen determination outlined is in compliance with the period "one year from date of such correction".

It is recognized that from such settlement there will be deducted retired pay for an intervening period within that extending from entitlement thereto until the period involved has ceased.

As authority I wish to cite 10 U.S.C. 1552 indicating that I was and am entitled to full active duty pay and allowances to the grades provided by the action on 4 October 1966 and for one year thereafter.

Attached hereto also are photostatic excerpt copies of Uniform Code of Military Justice (P1.296 Pages 4 and 28), offered as legal precedent.

Should it be that this communication is not addressed to the authorized official, it is requested that referral be made thereto.

Marion G. Doston
Colonel USAF (Retired)
FV150432 (263485678)

MGDsw
encl. 4

EXHIBIT D

THE VICE PRESIDENT
WASHINGTON

September 9, 1965

Dear Gene:

It was nice to hear from you, and I am sorry that we did not see each other in Tampa.

My Military Aide has thoroughly investigated Marion Denton's case and has advised me that the best course of action for Mr. Denton is to reappeal to the Air Force Board for the Correction of Military Records, under Air Force Regulation 31-3, requesting that they reconsider their findings of March 1964 on the premise that but for the court-martial, Mr. Denton would have stayed in the military service beyond September 2, 1945, and would have been promoted with his contemporaries to the grade of lieutenant colonel, or that he would have stayed in the service until after the effective date of the terminal leave promotion program and would have been eligible on separation for promotion to the grade of lieutenant colonel, or in the alternative, would have stayed in the active Reserve of the Air Corps and would have achieved a promotion to Reserve lieutenant colonel along with his contemporaries. Further, that subsequently by Reserve participation, he would have competed with his contemporaries for and been promoted to the Reserve grade of colonel prior to his 60th birthday. Mr. Denton should therefore contend that the Board should retire him as a Reserve colonel retroactively. The only other alternative would be a private relief bill, which would have virtually no chance of enactment so long as he has not exhausted his appellate channels with the Board for the Correction of Military Records.

My Military Aide further advises me that Representative Olin Teague is actively and effectively pursuing Mr. Denton's case with the Air Force. Since the Congressman is doing such an excellent job, I feel that he should continue to be Mr. Denton's spokesman. I will advise Representative Teague of my interest in Mr. Denton's behalf.

With all best wishes.

Sincerely,

Hubert H.

Hubert H. Humphrey

Mr. Eugene A. Flint
415 East Canfield Street
Avon Park, Florida

EXHIBIT E

DEPARTMENT OF THE AIR FORCE
Headquarters United States Air Force
Randolph Air Force Base, Texas

REPLY TO
Attn Of AFPMRDC 24 Oct 1966

Subject: Appointment as a Reserve Officer of the Air Force

To: Colonel Marion Gray Denton, AO 150432, Retired Reserve
205 Denton Avenue
Auburndale, Florida 33823

1. The Secretary of the Air Force has directed me to inform you that, by direction of the President, you are tendered an indefinite term appointment as a Reserve officer of the Air Force. Grade and service number are shown in the address above. Appointment is effective on date of acceptance.

2. Request you execute and return the inclosed oath of office at once. This action constitutes acceptance of your appointment and no other evidence is required. If you are unable to accept this appointment, return this letter with your statement of declination. Failure to respond to this tender of appointment within a reasonable period of time will result in cancellation.

3. You will not perform the duties of an officer under this appointment until specifically ordered by competent authority.

4. Authority for this appointment is 10 USC 593, and 1552d.

HAROLD W. HOSACK
Lt. Colonel, USAF
Directorate of Personnel
Resources & Distribution

1 Atch
AF Form 133 w/envelope

EXHIBIT F

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON, D.C.

REPLY TO ATTN OF: USAFMPC (AFPMRDS) RANDOLPH AFB TEXAS 78148

24 OCT 1966

SUBJECT: Correction of Records

TO: Colonel Marion Gray Denton, AO 150432, Retired Reserve
205 Denton Avenue
Auburndale, Florida 33823

1. Your military records are being corrected to reflect the changes enumerated in the 4 October 1966 directive of the Under Secretary of the Air Force. The corrective actions being taken will validate your status for any pay and allowances which accrue to you for a period of one year from the date of such correction. However, in order to validate your status for any pay and allowances which might accrue to you thereafter, the law requires that you be reappointed to the grade to which such payments relate.

2. Under the provisions of Section 1552d, Title 10, United States Code (70A Stat 116), you are tendered an appointment as Colonel, Reserve of the Air Force. This action is taken in anticipation of your submission of an application for retirement benefits in the Reserve grade of Colonel under the provisions of Section 1331, Title 10, United States Code, effective from 1 December 1956. It is an additional but a necessary part of the correction process to ensure your right to continuing payments beyond the one year covered by law.

3. Request the attached oath be properly executed and returned to this headquarters (AFPMRDS) as soon as possible.

4. If you have not already done so, it is suggested that you immediately submit the application forms for retirement benefits. These forms, furnished you in July 1964 by the Air Reserve Personnel Center (formerly the Air Reserve Records Center), Denver, Colorado, should be completed and forwarded to ARPC (RPCA-31), 3800 York Street, Denver, Colorado 80205.

FOR THE CHIEF OF STAFF

C. R. CARLSEN, Lt Colonel, USAF
Chief, Special Actions Branch
Directorate of Personnel Resources and Distribution

1 Atch
Appt Ltr w/Atch

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1095

MARION G. DENTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the Court of Claims' refusal to overturn the rulling of the Undersecretary of the Air Force that the relief accorded petitioner for a wrongful discharge as an Air Force reservist should include placement in the same position he would have occupied had no error been made, *i.e.*, dating his corrected release as of the post-World War II period of demobilization, rather than the date of the correction.

1. On August 19, 1944, petitioner, then a major in the Army Air Corps Reserve, was released from active duty following conviction by a general court-martial for failure to carry out a lawful order of a superior officer. In 1953 he requested the Air Force Board for Correction of Military Records to vacate the sentence of the general court-martial. In May 1954 the Board denied the application (Pet. App. 1a-2a).

In 1963 petitioner filed a second application to vacate his court-martial sentence (Pet. App. 2a). On March 19, 1964, the Assistant Secretary of the Air Force directed that the sentence be set aside and, in addition, that petitioner's military record be corrected to show that he was released from active duty, "due to demobilization" following World War II, on September 2, 1945, the effective date of the general demobilization (*ibid.*).

On November 30, 1965, petitioner filed a new application seeking amendment of the 1964 order to show that he was separated from active duty after September 2, 1945, on an unspecified date prior to April 1, 1953, when he was promoted to the rank of Colonel in the Air Force Reserve, and that he was promoted to Brigadier General in 1956 (*ibid.*). On October 4, 1966, the Undersecretary of the Air Force corrected petitioner's record to show that his active duty continued to December 2, 1945 (due to allowance of 90 days terminal leave beyond the initial September 2 date), and to show that in 1953 he was promoted to Colonel and that he retired in 1956 with entitlement to retired pay (*id.* at 3a-4a). In April 1967, petitioner received $42,511.57 as payment for sums due him as a result of these corrections to his record. Since October 1966, he has been receiving monthly retirement checks (*id.* at 4a).

On August 17, 1972, petitioner filed this action in the Court of Claims alleging that the Undersecretary's 1966 order was "arbitrary and capricious" and contrary to law because "neither the Correction Board nor the Secretary of the Air Force has the power to backdate a reserve officer's release from active duty" (Pet. App. 5a). Petitioner contended that the date of his discharge from active duty should have been March 19, 1964, when his court-martial sentence was set aside by the Correction Board, and that he should receive active duty pay until that date (*ibid.*).

The Court of Claims dismissed petitioner's complaint. The court held that petitioner's action was precluded by 28 U.S.C. 2501, which bars any claim filed in the Court of Claims "unless the petition thereon is filed within six years after such claim first accrues" (Pet. App. 5a-9a). The court also held that the Undersecretary, acting through the Correction Board, had authority to take any reasonable action calculated to put the serviceman in the same position he would have occupied had an error not been made, and that the backdating of petitioner's release to the post-World War II period of demobilization was reasonable and not an abuse of his discretion (*id.* at 9a-12a). The court noted that petitioner himself had requested the Board to backdate its correction of his records and that he had not claimed that his discharge from active duty should be shown as occurring at the time of the 1964 correction of his records (*id.* at 8a-9a).

2. The decision of the Court of Claims is correct and does not conflict with decisions of other courts, so that review by this Court is unwarranted.

a. The action was barred by the six-year statute of limitations. Even if petitioner's claim did not accrue when the Correction Board first acted on his claim in May 1954, the gist of petitioner's complaint is that his release was erroneously backdated to September 2, 1945, a determination first made in the Undersecretary's order of March 19, 1964. Accordingly, petitioner's claim in the present action "first accrued" no later than that order[1] and the six-year period of lim-

[1]The March 19, 1964, order was final and was not "reopened" by the November 30, 1965, application. The Court of Claims has held that a request for reconsideration must be filed within a short period following the Correction Board's decision in order to suspend finality. *E.g.*, *Dayley* v. *United States*, 169 Ct. Cl. 305,

itations ended on March 19, 1970, more than two years before this action was begun.

b. The Court of Claims decision was also correct on the merits. The controlling statute, 10 U.S.C. 1552,[2] grants to the Secretary of a military department, acting through Correction Boards, the authority to correct records "when he considers it necessary to correct an error or remove an injustice." The Court of Claims has consistently held that the statute grants the Secretary broad discretion to take any action reasonably calculated to put a wrongfully discharged serviceman in the same position he would have occupied had an error not been made. *Kimmel* v. *United States*, 196 Ct. Cl. 579, 591. As the court below stated (Pet. App. 10a):

> Many factors, such as the needs of the armed services and the characteristics of the particular individual involved, can affect the date on which a serviceman would have been discharged had an improper discharge never occurred. In a case such as the

---

309; *Biddle* v. *United States*, 186 Ct. Cl. 87, 98. Moreover, as the court below properly noted: "We see no reason why proceedings initiated by an application for entirely new relief, which could have been requested prior to an earlier favorable decision, should deprive the earlier decision, which granted all the relief requested, of finality" (Pet. App. 7a). Finally, the court correctly concluded that petitioner "may not base his cause of action on the 1966 decision since "the claim he asserted during the 1965-1966 proceedings was very different from his claim here that the Correction Board's lack of power to backdate his discharge entitles him to active duty pay for the period from September 2, 1945, until March 19, 1964" (Pet. App. 8a-9a).

[2]Section 1552(a) provides in pertinent part that

> [t]he Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct error or remove an injustice.

> one at the bar where the original discharge is not invalidated until many years after it occurred, such factors certainly might indicate that the complainant would have been discharged prior to the invalidation date.

The court below specifically found that the Undersecretary acted reasonably and well within his broad discretion in determining that petitioner would probably have been discharged on September 2, 1945, the effective date of the general demobilization following World War II. At that time petitioner would have been a reserve officer in his forties, employed in a nonrated capacity as a technical inspector (1966 Board Tr. 36). As the court below stated, this was "a time when many reserve officers were released from active duty because they were no longer needed" (Pet. App. 11a), and there is no reason to believe that an exception would have been made for petitioner.[3]

Moreover, contrary to petitioner's assertion (Pet. 8), the court's ruling was in accord with prior decisions of the Court of Claims. For example, in *Merriott* v. *United States*, 163 Ct. Cl. 261, 264, certiorari denied, 379 U.S. 838, the court similarly held that although a reservist's release in 1945 was unlawful, the 1945 release date did

---

[3]As a reserve officer, petitioner had no vested right to remain on active duty, since a Secretary of a military department may (with certain exceptions not here relevant) release a Reserve officer under his jurisdiction from active duty "at any time." 10 U.S.C. 681(a).

not require correction because it "came too close to the end of World War II for the court to speculate that, unlike millions of other reservists, he would have been kept on active duty."[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.

---

[4]The case petitioner cites for the proposition that the backdating of discharges is unlawful (*Egan* v. *United States*, 141 Ct. Cl. 1, 15-19) was distinguished in *Merriott*, where the court stated (163 Ct. Cl. at 265):

> In *Egan*, the officer was illegally and erroneously released to inactive duty in October 1943, and then illegally discharged from the Marine Corps Reserve in April 1944, on the ground that he was insane (which he was not); if the true facts had been known it would have been highly unlikely that a healthy Marine Corps combat officer would have been released in the very midst of World War II; in fact, no reason for such a release at that time appeared in the record * * *.

Petitioner's case is quite different.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAY 7 1975
MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1095

MARION G. DENTON,
Petitioner,

v.

THE UNITED STATES,
Respondent.

MEMORANDUM IN REPLY TO MEMORANDUM IN OPPOSITION

ROBERT H. REITER
1317 F Street, N.W.
Washington, D.C. 20004

CLAUDE M. HARDEN, JR.
203 South Florida Avenue
Lakeland, Florida 33801

JOHN H. SPAULDING
1317 F Street, N.W.
Washington, D.C. 20004

Attorneys for Petitioner

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

MARION G. DENTON,

Petitioner,

v.

THE UNITED STATES,

Respondent.

MEMORANDUM IN REPLY TO MEMORANDUM IN OPPOSITION

The Government's Memorandum in Opposition would create the mistaken impression that the petitioner has received adequate compensation by reason of the payment of a portion of the money he would have received had it not been for the fundamental "nature of the defect", and the extreme "gravity of the harm from which relief is sought", in terms of the recent opinion of the Court in

Schlesinger v. Councilman, No. 73-662, decided March 25, 1975, slip op., p. 14, where the Court affirmed the authority of civilian courts to consider collateral attacks on court-martial decisions.

So serious was the error in this case as to justify an investigation and report of a Congressional committee during the pendancy of the review proceedings – the only time in history that this has been done. For the Court's reference, a copy of the report of the Special Committee of the House Committee on Military Affairs is appended hereto as Appendix A.

Petitioner is not seeking largesse. In fact, the amount he has received to date has been more than consumed in the cost of his efforts to obtain justice in the sense of recovering what he would have received had he merely been treated like any other officer. A cursory reading of the Government's Memorandum might indicate that petitioner was made a Brigadier General, but this is not so. What he sought principally in 1965 in his application to the Correction Board was the implementation of the Board's 1964 decision setting aside his discharge and granting him restoration of all rights, privileges and property of which he was deprived". He did seek the correction of the release date utilized by the Board, but this could only have been known in 1964 when the Board in its decision first utilized that date. Thus petitioner did not sleep on his rights in this respect. It is worthy of note that he was not made a brigadier General, as a cursory reading of the Government's Memorandum might indicate. This though the vicissitudes encountered during solitary confinement – struggles encountered in being with the diversion of funds far in excess of that cited as being made available by the Government to the petitioner. All from

that day when petitioner heard the ringing sound "Guilty" during his mission of making trees taller and grass greener.

The Government admits in its statement of the case that petitioner's 1965 application sought only the "amendment" of the Correction Board's earlier decision. Actually it was filed at the suggestion of the Vice President of the United States, and was treated by the Board itself as a "reconsideration" of its earlier decision.

The Government refers to petitioner's conviction for failure to carry out a "lawful" order of a superior officer, but does not go further to point out that the "lawful" order was that of an Army colonel in direct conflict with an order of the President of the United States directing petitioner to take over the command of that same colonel.

The Government also refers to the "general demobilization following World War II" as establishing the reasonableness of the date given by the Board to petitioner's release from active duty. However, that date, September 2, 1945, was "V-J Day", when our troops were deployed throughout the Pacific Theater at full wartime strength, and had not even begun the actual physical process of demobilization. It is doubtful if any serviceman was separated on that date.

No mention is made in the government's memorandum of the causes of action of the petitioner independent of the authority of the Correction Board, and in particular, of the statutes granting retroactive pay following the restoration of military commissions. The Government also fails to consider the question raised by petitioner as to the representations made by the Government as to the applicability of limitations, as per the copies of communications appended to the petition. The effect of these was to confuse and mislead the petitioner, and raises the question of

clean hands in the Government's treatment of him. The Federal issues in this case are substantial and important, and they merit the Court's consideration.

Respectfully submitted,

ROBERT H. REITER
1317 F Street, N.W.
Washington, D.C. 20004

CLAUDE M. HARDEN, JR.
203 South Florida Avenue
Lakeland, Florida 33801

JOHN H. SPAULDING
1317 F Street, N.W.
Washington, D.C. 20004

Attorneys for Petitioner

APPENDIX

Re: Major Marion G. Denton

COURT MARTIAL OF MAJOR MARION G. DENTON

Marion G. Denton, Major, Air Corps, Serial No. 0-150432, a cadet in World War I, receiving his primary training at Park Field, Millington, Tennessee, and having an aeronautical rating of Reserve Military Aviator, was ordered to duty by S.O. - 176, paragraph 124, of the War Department. An extract of that order follows:

"EXTRACT

* * *

124. Par. 98, S.O., 166, W.D., 1941, is revoked. By direction of the President under the authority contained in Public Resolution No. 96, 76th Congress, approved 27 August, 1940, Major MARION GRAY DENTON (0-150432), Air Corps Reserve, is ordered to active duty, effective 1 August, 1941. On that date he will proceed from Auburndale, Florida, to Maxwell Field, Montgomery, Alabama, reporting to the commanding officer, Air Corps Advanced Flying School, for duty. Major DENTON will rank from 1 August, 1941. He will be relieved from duty in time to enable him to arrive at his home on 31 July, 1942, on which date he will revert to inactive status. The travel directed is necessary in the military service. FD 1499 P1-06 A 0410-2 and 3 and QM 1601 P61-07 A 0525-2 and 3. The duties to be performed by this officer will not require him to participate in regular and frequent aerial flights.

* * *

BY ORDER OF THE SECRETARY OF WAR:

G.C. MARSHALL
Chief of Staff

OFFICIAL:
E.S. Adams
Major General
The Adjutant General

A TRUE COPY
/s/ George P. Keenan
GEORGE P. KEENAN,
W/O (jg) AUS
Asst. Technical Inspector."

It will be noted that the final sentence of that order reads: "The duties to be performed by this officer will not require him to participate in regular and frequent aerial flights."

It is noted that upon his reporting to duty he made several efforts to have his flying status restored; that in the latter part of 1942 he complied with Army Air Forces Regulation 50-3 and purchased some flying time "outside"; that due to a change in Regulation 50-3 he bought some "high-powered" flying time and in April 1943 a Board of Officers was convened and he qualified through a flying test with a rating of Pilot. His statement that he qualified for the aeronautical rating of Pilot is based upon the fact that he was told by the Board that he had met the qualifications and saw the approval of the Board as evidenced by the Board proceedings which were returned to Southeast Army Air Forces Training Center for correction. He has not had official notice of this qualification. Major Denton attended the Technical Inspectors School at Chanute Field. This background is given for the purpose of determining whether or not as of June 18, 1943, he was a flying officer and eligible to command Air Forces units in compliance with Army Regulation 95-60.

While he was at Chanute Field he received a letter from his Post Adjutant, stating that a telegram had been received advising that he was to be detailed as Post Commander in an active theater. This letter bore the approximate date of May 28, 1943, and was from Headquarters, Buckingham Army Air Field, which was his home station at that particular time. The letter enclosed a telegram from Southeast Army Air Forces Training Center, stating he was to be detailed as Post Commander in an active theater. That telegram and letter were presented as exhibits C and D in his

trial but were not even considered as bearing upon his defense at trial, to the effect that his order S.O. - 156 specifically ordered him to be assigned as Post Commander of the Greenland Base Command. . . . "upon arrival at destination he will assume command." It was at Maxwell Field that he first learned that he was assigned as Post Commander of an active threater, Greenland Base Command. Order 156, extract of which is set forth herewith, directed Major Denton to proceed to Presque Isle and to report to the commanding officer of the North Atlantic Wing for transportation to destination, which he did, arriving at Presque Isle on June 16, 1943.

"S E C R E T

HEADQUARTERS
ARMY AIR FORCES SOUTHEAST TRAINING CENTER
Maxwell Field, Alabama

SPECIAL ORDERS) June 8, 1943
No. 156) EXTRACT S E C R E T
Auth: Hq AAFSETC
Initials ?
Date: 8 June 1943

* * *

3. MAJ. MARION G. DENTON 0150432 AC is reld fr asgmt to BAAF Fort Myers, Fla. and by direction of the President is asgd as Post Commander of the Greenland Base Command. He WP fr BAAF Fort Myers, Fla. to Presque Isle, Maine, reporting to the CO North Atlantic Wing Air Transport Command not later than June 15, 1943, for T by air to destination. Upon arrival at destination he will assume command.

* * *

By command of Brigadier General WELSH,

D.D. FITZGERALD,
Colonel, G. S. C.
Chief of Staff

OFFICIAL:
/s/ JAMES W. PORTER
JAMES W. PORTER
Lt. Col., A.G.D.,
Asst. Adj. General

S E C R E T."

Upon arrival he presented to the Adjutant of the North Atlantic Wing a copy of his secret orders; the Adjutant could not determine exactly where he was to go and remarked, "There are several installations in Greenland and I do not know where to take you." Major Denton replied, "All I have is the order itself." The Adjutant then told him to go to officers' quarters and that he would hear from him. On June 17, 1943, the Adjutant sent for him and informed him that information had been received from the War Department as to the proper destination and proceeded to issue a trip ticket to BW-1. BW-1 is also designated as APO 858, c/o Postmaster, New York, New York. Acting upon the information of the said Adjutant that he was being sent to the proper destination, Major Denton boarded a plane on the afternoon of June 17, 1943, and was taken to the Greenland Base Command designated as APO 858, arriving there in the early hours of the morning of June 18, 1943. Later that morning he directed the Officer of the Day to take him to Post Headquarters and was conducted to the Post Headquarters and introduced to a Major Lloyd. He told Major Lloyd, "I have come here to

assume command of the post" and started to take from a manila envelope a copy of S.O. - 156, which we have discussed. Major Lloyd, without seeing a copy of said order, said "Let's go see the Colonel." This action of Major Lloyd's led Major Denton to believe and assume that Col. Robert W.C. Wimsatt was the post commander. He was conducted into the Adjutant's office, introduced to Captain (now Major) Anderson, and waited approximately 30 minutes while the Adjutant went to another office. The Adjutant then returned and asked for a copy of Major Denton's orders. Taking the copy of the orders, the Adjutant disappeared again. When he returned, Major Denton was taken in and introduced to Colonel Wimsatt. Upon looking at the copy of the order, Colonel Wimsatt remarked, "That's a crazy-looking order, it looks like an Air Corps order." In the course of their conversation, Colonel Wimsatt said, "There is no such thing as Post Commander of the Greenland Base Command." Present at this conference was Colonel Wimsatt, a Col. Kelsey Reeves, a Capt. Thomas L. Anderson, and Major Lloyd. Whereupon Major Denton told Colonel Wimsatt that it might be a crazy order but that he did not write it, he was there merely to comply with it. Colonel Wimsatt did not inquire into any qualifications, credentials, personal history, or reasons for the presence of Major Denton, and it is presumed that all of this had been talked over in the 30 minutes that Major Denton was kept waiting for the interview. Colonel Wimsatt finally told Major Denton to return to his quarters and that he would hear from him.

The foregoing is substantiated by testimony at the trial, in which Colonel Wimsatt testified that Major Denton did not formally report to him, that it was in the form of a visit. That statement was correct because Major Denton was really appearing for the purpose of taking over command.

June 18, 1943, was Friday.

Colonel Wimsatt made no further contact with Major Denton. The next day, which was Saturday, Major Denton wrote a letter direct to the Air Inspector, Army Air Forces, Washington, D.C., attention Technical Division, explaining the predicament in which he found himself and in paragraph 2 he stated: "At present no duties have been assigned or assumed, due to the evident conflict of orders with organization and the presence of the undersigned is not immediately needed at the above APO." Also, in paragraph 4 of same letter: "Transports of the ATC fly between this Post and Washington, and it is thought that a trip by such means would result in several very helpful clarifications." Major Denton received an endorsement reply to the foregoing letter under date of June 29; however, orders were not issued by Washington to enable him to carry out the suggestion.

Having heard nothing from Colonel Wimsatt, early on Monday morning of June 21, 1943, Major Denton attempted to confer with him and was informed that he was not in his office; then, in the early afternoon of the same day, Major Denton again called at the office of Colonel Wimsatt and succeeded in getting an audience with him. He stated to the Colonel that he had been ordered by the War Department to that particular destination to perform a certain duty and had been unable to perform that duty, and thought it advisable for him to notify the War Department in Washington, to which Colonel Wimsatt replied that it was not necessary, stating, "This is where you belong." Evidence obtained shows that this statement was in conformity with Major Denton's ideas, as he firmly believed that he belonged right there and that he was to assume command as post commander under his S.O. - 156. It is also evident that, regardless of what Colonel Wimsatt knew and/or

believed, he did nothing to help Major Denton clarify this situation either by advice or command.

This Committee has before it facts to show that while Colonel Wimsatt attempted to justify his actions by saying he knew Major Denton was coming to the base and why he was coming, and that his knowledge was based upon information received by him from the War Department, both mail and radio, copies of which were in his files at the base headquarters; yet he did not at any time, even upon request, produce such written evidence to support his statement. Also, his statement was refuted by his Adjutant, Captain Anderson, who stated there were no other orders at the base, just the S.O. - 156. When asked before the investigating officer whether he relied upon this order for his authority to issue commands to Major Denton, Colonel Wimsatt replied, "Not specifically, we have War Department order on your being transferred here." From the position that Colonel Wimsatt took later, this statement is incorrect and a variance. Responses to inquiries made by this Committee to the War Department were to the effect that no orders concerning Major Denton could be found.

Four days passed during which time Major Denton, receiving no instructions or advice from Colonel Wimsatt, remained in transient quarters.

Out of a clear sky, on June 23, 1943, without advance instructions, conference, advice, or information of any sort, Colonel Wimsatt's billeting officer, Lt. Frank Zitnik, appeared at the transient officers' mess, where Major Denton was eating his noonday meal, and informed him that he, Lieutenant Zitnik, was relaying a message from Major Anderson to the effect that a plane was going to leave in about twenty minutes; that "they" would like to have him on it

and for him to call the Priorities and Passenger Officer. As Major Denton was leaving the mess hall, he met the Assistant Adjutant, who said that "they" had been looking for him for fifteen minutes. Major Denton replied that he did not know what it was all about and that he expected to see the Colonel before he went anywhere. Major Denton then proceeded to his quarters and in a few minutes the Colonel and his Adjutant came in. The following conversation ensued:

> Colonel: Major, I want you to get on the airplane waiting for you and go to No. 2.
>
> Major: I understood, Colonel, that we were to have a conversation before I was sent anywhere.
>
> Colonel: I have a sick commander and want you to go and take over at No. 2.
>
> Denton: In that case I request that you report me as unfitted for duty.
>
> Colonel: I am not going to argue with you – you are going on that plane or I am going to try you.
>
> Major: Then, sir, I suggest that you try me.
>
> Colonel: Prepare the charges, then, Captain."

Colonel Wimsatt and his adjutant then left the building.

It is difficult for the Committee to understand how a commanding officer, assuming he was such and a superior officer, could send a new officer to any assignment without assuring himself that the new officer had, and fully understood, complete instructions as to the duties to be performed and the exact location of the place of assignment. It should be borne in mind that Colonel Wimsatt was fully

aware that this officer had not been in the Arctic before and did not know what conditions he was facing, nor whether he was being sent to a flying field, a weather bureau, or a radio station.

The evidence presented to the Committee shows that later that day, June 23, 1943, Major Denton was placed under arrest and confined to his quarters, having access only to the transient mess and the latrine, which were in adjacent buildings.

On June 24, 1943, at 10:45 a.m., Major Denton had delivered to him a copy of the following order:

"HEADQUARTERS BASE COMMAND
APO 858, c/o Postmaster
New York, N.Y.

SPECIAL ORDERS) 23 June 1943
:
NUMBER 111)

1. Major MARION G. DENTON, 0150432, Air Corps, having reported for duty with this Command 18 June 1943 pursuant to Paragraph 3, classified Special Orders 156, Headquarters Army Air Forces Southeast Training Center, Maxwell Field, Alabama, dated 8 June 1943, is hereby relieved from attached to Headquarters and Headquarters Company Base Command, APO 858, c/o Postmaster, New York, N.Y., and assigned to Army Base, APO 679, c/o Postmaster, New York, N.Y., and will proceed thereto by first available air transportation. Upon arrival Major Denton will assume command of Army Base, APO 679, c/o Postmaster, New York, N.Y., relieving the present commanding officer Major CARL G. JENSEN, 0306039, Infantry.

Transfer of funds and property, etc. will be accomplished according to appropriate Army Regulations.

* * *

By order of Colonel WIMSATT:

THOMAS L. ANDERSON
Captain, Infantry
Adjutant

OFFICIAL:

/s/ THOMAS L. ANDERSON
Thomas L. Anderson
Captain, Infantry
Adjutant"

HEADQUARTERS BASE COMMAND
APO 858, c/o Postmaster
New York, N.Y.

23 June 1943

SPECIAL ORDERS)
:
NUMBER 111)

1. Extracted.

2. Major CARL C. JENSEN, 0306039, INF, is reld dy and assignment Army Base, APO 679 NYC, and assigned to Army Base, APO 858, NYC. He WP thereto by first available T. reporting upon arrival to the CO thereof, to assume command of the 73rd Inf Bn (Sep).

3. VOCO of 19 June 1943 attaching Major MARION G. DENTON, 0150432, AC, to Base Hq & Eq Co, APO 858 NYC, for administration is hereby confirmed and made of record.

By order of Colonel WIMSATT

THOMAS L. ANDERSON
Captain, Infantry
Adjutant

OFFICIAL:
/s/ THOMAS L. ANDERSON
Thomas L. Anderson
Captain, Infantry
Adjutant"

The fact that the above order was published after the arrest of Major Denton and not prior to the foregoing oral order, would not have been important or irregular, in the interest of time, had Colonel Wimsatt, or his properly designated officer, taken up the matter of assignment and duties to be performed and had informed Major Denton that an order covering the discussed assignment would follow him.

However, in complete absence of any advance instructions or discussion relative to the assignment in question, and believing his orders to be definitely contrary to such action, Major Denton's case presents a very unusual situation. It is understandable that if combat conditions actually existed, or there was danger of its taking place, there might be occasion for a commanding officer to disregard the formalities which were certainly due in this instance; but such conditions did not exist.

A close examination of the conversation alleged to be a legal order given by Colonel Wimsatt to Major Denton, knowing that based upon that conversation charges were preferred, would lead a thinking man to wonder if he were being "shanghaied." It must be remembered that six days had passed and Colonel Wimsatt had not attached Major Denton

to any organization, had not advised or informed him as to what his duties were or were to be, but had requested him to remain in transient quarters and eat at transient mess, the same as any visiting officer.

The Committee has before it the fact that on July 10, 1943, Colonel Wimsatt was relieved of his command at Greenland Base Command on orders instituted in Washington as of June 24, 1943, the next day after the alleged violation by Major Denton.

Colonel Albert D. Smith, now a Brigadier General, relieved Colonel Wimsatt, and took over command of Greenland Base Command on July 10, 1943, and immediately went on a mission to Iceland, returning to his command on July 28, 1943. During all of that interval, from June 23, 1943, to July 28, 1943, Major Denton had remained in highly restricted confinement. Then on July 28, 1943, Colonel Smith called Major Denton to his office and lifted the confinement. In his conversation with Major Denton, Colonel Smith invited a full explanation of his position, saying that he had heard of Major Denton's case while in Washington, prior to coming to Greenland, and wanted to help any one in trouble; that Major Denton was not a criminal and he was not going to treat him as one; that when he, Denton, went out of the door of that office, he could do anything that any other officer of the base could do; that Major Denton would stop eating in the transient officers' mess, and would eat with the permanent officers; that Colonel Wimsatt was trying to protect Major Lloyd; that he, Colonel Smith, was in hopes that Washington would send the charges back for another investigation and recommendation, and, in that case, it would be disposed of. Colonel Smith exhibited to Major Denton a letter he had received from Maxwell Field, stating Major Denton's

S.O. - 156 had been amended, assigning him to the Greenland Base Command. Major Denton did not receive a copy of the amendment, but was shown same at Mitchel Field on August 20, 1943, the day of the second investigation, at which time Major Denton asked for and was furnished with a typewritten copy. The Amended Order reads as follows:

"WAR DEPARTMENT
THE ADJUTANT GENERAL'S OFFICE
WASHINGTON, D.C. JHD/egw/1515-MU

AG 201-Denton, Marion G.
(6-2-43) PO-A.

8 July, 1943

Subject: Amendment of Orders.

Thru: Commanding General,
Southeast Air Force Training Center
Maxwell Field, Alabama.

To: Major Marion G. Denton, 0-1580432, Air Corps.

1. The Secretary of War amends paragraph one (1) of classified letter orders AG 201-Denton, Marion G. (6-2-43) PO-A, 5 June 1943, pertaining to Major Marion G. Denton, to read as follows: It is desired that you issue the necessary orders to relieve Major Marion G. Denton, 0-150432, Air Corps, from his present assignment and duty, effective at such time as will enable him to comply with this order, and assign him to the Greenland Base Command. He will proceed from his present station to Presque Isle, Maine, and report to the Commanding Officer, North Atlantic Wing, Air Transport Command, not later than 15 June 1943, for transportation by air to destination. Upon arrival

at destination he will report to the Base Commander for duty.

/s/ BEN D. CULLETON
Ben D. Culleton
Adjutant General.

Distribution:

Commanding General, Army Air Force.
Army Postal Service, Room 3-e-561, The Pentagon

A TRUE COPY
/s/ W. STONE
W. Stone
Major, A.G.D.
Asst. Adj. General."

If the original order of June 8, 1943, pursuant to which Major Denton proceeded to Greenland, was clear as to its proper interpretation, there was no need to issue corrective orders dated July 8, 1943, and in that very correction it creates in the opinion of the Committee, a doubt on the part of the War Department itself as to the meaning of the orders of June 8, 1943. It is, furthermore, firmly the opinion of the Committee that where such a doubt existed as to the proper meaning and interpretation of orders as to cause the War Department to correct them, as was done, the situation thereby corrected is certainly not one to result in the sentecning of an officer with a past record such as Major Denton had, to twelve years at hard labor, nor in fact to even subject him to trial by court martial. The Committee notes that as late as July 8, 1943, the War Department in Washington recognized the fact that they had not assigned Major Denton to the Greenland Base Command, as is shown by the foregoing amended orders addressed to

Major Marion G. Denton *through* Commanding General, SEAFTC, Maxwell Field, Alabama, and not through the commanding general of Greenland Base Command. Therefore, the commanding officer (either Colonel Wimsatt or his successor) could not have assigned him to the Greenland Base Command without proper authority from the War Department, and, likewise, neither of them could possibly have been his superior officer on June 23, 1943, for the purpose of giving him orders of duty. The amendment negates the charge of violation of the 64th Article of War.

Major Denton left Greenland on August 17, 1943, on orders to report to Mitchel Field for temporary duty. On August 20, 1943, he was ordered to appear before an investigating officer for a second investigation. Colonel Wimsatt did not appear before this investigating officer, but his statement of expected testimony was introduced. It could be reasoned that the Commanding General of the First Air Corps did not adopt the report previously made in Greenland but instead ordered a new investigation upon which a recommendation for a court martial trial could be successfully based. In this second investigation Colonel Wimsatt was conspicuous by his absence, although readily available. This is borne out by a portion of the record of trial. Defense moved to quash the charge upon the ground that the charges and specifications were not given a fair and impartial investigation, that the investigating officer exceeded his authority in that he acted as judge and jury to determine the legality of the order involved, and that the accused was not given the opportunity to examine all of the documents alleged to be in the accuser's possession. It is believed that Major Edward A. Borsage exceeded his authority in assuming to examine all documents and determining whether they were legal without disclosing their contents to the accused or producing them. In denying

the motion to quash, the court had before it the statement of the prosecution in objection to the motion, to wit:

> "Prosecution: The accuser, Colonel Wimsatt, was present and was called to testify before the investigation officer. At the investigation by Colonel Sparks at Mitchel Field, the accuser, Colonel Wimsatt, was not available. *At that time Colonel Wimsatt was in Arkansas. He had not yet been called for the trial - the other witnesses had. . . .*" (Emphasis supplied.)

According to the prosecution's statement, it had been determined before the second investigation was conducted, that there was to be a trial. Therefore, his investigation report must meet that requisite, and it is manifest that he had to keep out of his report any possibility of the question of legality arising, by making the accuser "not available." Can it be that this complies with the 70th Article of War requiring that an investigation shall be thorough and impartial? If it is not the province of the court to determine whether or not the investigation was or was not thorough and impartial, but a matter for the reviewing authority, how was the reviewing authority to be able to determine the legality of the first investigation when it was discarded, thereby reaching the inevitable conclusion that its disclosure would prove there was no violation?

At the trial, Major Denton could not get the defense counsel of his choice, and the reason given was that he was not *available*, although Major Denton had asked for him immediately after his arrival at Mitchel Field, August 18, 1943, and the trial was held on September 27, 1943. Two officers unknown to the accused were appointed defense counsel, and in contrast with the members of the prosecution, the defense counsel had little experience with serious charges, neither one being a member of the Judge

Advocate General's Office. A Colonel Gersten, who has the reputation of being an outstanding defense counsel, was designated law member of the court as originally constituted. Late Saturday afternoon before the trial was to begin on Monday morning, Colonel Gersten was relieved as law member, and a Colonel Fisher, who was a member of the Judge Advocate General's Office, and who had an office in a temporary building adjoining that of the Trial Judge Advocate, was appointed. The same order named a member of the Judge Advocate General's Office from Washington as Trial Judge Advocate, while the original Trial Judge Advocate was named as assistant.

To sustain the charge, it would have neen compulsory to have the testimony of the officer in the Adjutant General's Office, in Washington, who gave the directive to SEAFTC to issue order to Major Denton, Lt. Col. J.H. Dailey. That officer was responsible for the issuance of this order, and he knew what it directed to be obeyed. His testimony would have shown whether or not he intended to assign Major Denton to be post commander of Greenland Base Command and to assume that command upon arrival there. This officer is now and was then Chief of the Overseas Assignment Section of the Adjutant General's Office and upon inquiry from him for the Committee he stated that the Army Air Forces requested that Major Denton be assigned as Post Commander of the Greenland Base Command; that before those orders were actually prepared he received a telephone message from the Air Forces to the effect that they "had better make it by direction of the President because an officer on the Post ranked him," and that it was for this reason that they put in that it was by order of the President; that "otherwise, if he would have reported to the Post to which he was assigned the

other chap who ranked him would still have been the Post Commander, not Denton."

This should entirely eliminate any doubt as to what was intended in issuing the order of June 5, 1943, to Maxwell Field which was the basis of the orders of June 8, 1943, to Denton, but in addition to this those orders were not clear or definite even to such extent. Furthermore, there is no question but that full authority is definitely found in existing law for the President to issue such orders in the event of his determining that they are indicated as stated in the Federal Code Annotated:

> "1591. Rank and precedence among Regulars, Militia, and Volunteers (article 119). – In time of war or public danger, when two or more officers of the same grade are on duty in the same field, department, or command, or of organizations thereof, the President may assign the command of the forces of such field, department, or command, or of any organization thereof, without regard to seniority of rank in the same grade. (June 4, 1920, c. 227, sub-chapter II, & 1, 41 Stat. 811.)"

There was clearly confusion in the issuing of said order, as was shown in a letter from the Air Adjutant to Colonel Philip Doddridge, Maxwell Field, Alabama, dated July 6, 1943, in answer to a letter dated June 30, 1943, from Colonel Philip Doddridge, and the amendment. These two letters are quoted below:

"Secret

HEADQUARTERS
ARMY AIR FORCES SOUTHEAST TRAINING CENTER
Maxwell Field, Alabama

30 June 1943.

Colonel Fred C. Milner, A. G. D.,
Air Adjutant General,
Headquarters, Army Air Forces,
The Pentagon,
Washington, D.C.

Dear Colonel Milner:

"I am submitting to you a situation that has arisen in Greenland and which has come to our attention through personal corresponsence.

"Pursuant to a secret letter, The Adjutant General, dated 5 June 1943, file AG 201-Denton, Marion G. (6-2-43) PO-A, this headquarters issued paragraph 3, Special Orders No. 156, 8 June 1943, which reads in part as follows:

'Major Marion G. Denton, 0150432, Air Corps *** by direction of the President is assigned as Post Commander of the Greenland Base Command. He will proceed ***. Upon arrival at destination he will assume command.'

"You will note that the wording in the letter of The Adjutant General, cited above, is identical to the wording we use in our Special Orders.

"Attached is a copy of a letter written by Major Denton to an officer in the Judge Advocate's office of this headquarters, which indicates either a serious situation existing

in Greenland or very definitely a misunderstanding as to Major Denton's status.

"I pass this on to you for any action that you may deem desirable and appropriate, and would very much appreciate advice from you as to what action you may decide to take.

"With kindest personal regards,

Sincerely,

/s/ PHILIP DODDRIDGE
Philip Doddridge
Colonel, A. G. D.,
Adjutant General

SECRET"

"SECRET

6 July 1943.

Colonel Philip Doddridge,
AAFSE Training Center,
Maxwell Field, Alabama

Dear Colonel Doddridge:

"I had the matter of Major Denton's assignment looked up in our Personnel Division. They have just informed me that they have asked The Adjutant General to amend the order to delete so much as reads 'and by direction of the President assign him as Base Commander of the ***Base Command' and to substitute therefor, 'assign him to the

***Base Command' and to direct him upon arrival at destination to report to the 'Base Commander' instead of 'assume command'.

"I do not know if the original order was a mistake or not. It has apparently caused considerable difficulty and I hope that the change mentioned above will straighten out matters without further trouble. If I can be further service, let me know.

Sincerely yours,

FRED C. MILNER,
Colonel, A.G.D.,
Air Adjutant General

SECRET"

Major Denton attempted to carry out the duty assigned in S.O. -156 and in so doing he was clearly justified by the foregoing facts. If there was a violation of Colonel Wimsatt's order in defiance of S.O. - 156, it was not chargeable to Major Denton, but to the Adjutant General's Office in Washington. When Colonel Carey testified that Major Denton had been sent to relieve Colonel Wimsatt, the Trial Judge Advocate said, "That in itself is ridiculous, not even the President can do that." This is contradicted by existing law as quoted above.

Colonel Malcolm Stewart, a Regular Army officer of thirty years experience, whose assignment was Air Inspector of the First Air Force and whose duty was to see that all orders were properly carried out, was not allowed to testify for the defense as to what was Major Denton's duty under that order, because they said he was not an expert.

Colonel Raynor Garey, AGD, Adjutant General, First Air Force, was called as a witness for the defense. His testimony, in part, follows:

Q. But due to your experience you were taken in here as Adjutant General and sent up here as an experienced man to assist in the proper writing of orders for the First Air Force?

A. That is my duty as Adjutant General of the First Air Force.

Q. I hand you an order which is marked "Exhibit No. 1" in this court-martial proceeding and would like to ask you to read Paragraph 3 particularly of that order.

A. (Witness reads as requested).

Q. Colonel Garey, if you wrote that order and an officer came to you and said it was not clear to him, what would you tell him his duties were to be?

A. I would read over the order to him and tell him he was assigned as post commander of the Greenland Base Command.

Q. Would you interpret any other post either than as post commander, Greenland Base Command?

A. It doesn't mention anything other than the post commander, Greenland Base Command.

Q. His duty would be to assume command as post commander of Greenland Base Command?

A. That's what the order says.

* * *

Q. If I should tell you that the Greenland Base Command consists of several posts?

A. He would be post commander of whatever was in the Greenland Base Command if there was more than one. There can be only one base or post commander.

In the prosecution's summation of the case to the court, his statements are quoted:

". . . The whole defense has been that Colonel Wimsatt was not the accused's superior officer and that defense is based upon a very nice interpretation of Paragraph 3, Specification Orders No. 156, introduced in evidence as Prosecution's Exhibit No. 1. The defense would have the court believe that that order meant to say "the" post commander. The prosecution asks the court to believe that that order meant "a" post commander. If that word "a" had been in there, there could have been no question as to the meaning of that order. It is our belief that with the evidence before the court there can indeed be no question as to the meaning of that order. . . ."

If the prosectuion suggested that "a" should be read into the order of June 8 as stated in the above quotation so that the order would read "a post commander," it would seem necessary that the Court proceed then to read into the orders something to indicate which post he was to command, as the evidence shows clearly there were three posts in Greenland. It seems hardly within the realm of justice for a trial court to reconstruct an order and upon that reconstruction render a verdict against the

defendant, particularly when the War Department itself had reconstructed the order under the date of July 8. If the court reached its verdict after such mental processes, thereby creating a nunc-pro-tunc order, it is a far cry from justice as the Committee sees it.

The prosecution stated that Major Denton offered no rebuttal to the "presumption that this command was a lawful command." The whole military machinery is within the reach and command of the Judge Advocate General's Office and if that statement of the prosecution intends to convey that they had rather convict an officer than to summon information from the appropriate departments that might reflect favorably upon an officer, then, indeed, justice by court martial has reached "an all-time low."

The Committee is informed that in ten minutes after the court was closed they had arrived at a verdict of guilty. This is a further indication that it was predetermined that the accused was to be tried by court martial and convicted. The accused was thereafter sentenced to be dismissed from the service; to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for twelve years. It is understood that following a review of this trial record, in accordance with the usual procedure, by the Judge Advocate General, that the sentence of 12 years has been reduced to 5 years, and that the record has been referred to the President for appropriate action.

To be guilty of a violation of the 64th Article of War, it must be shown conclusively that the accused acted "wilfully", or with bad intent. It must also show that there was a lawful command by a superior officer. It is clearly shown in this case that the accused was endeavoring to the best of his ability to carry out what was a War Department

order by direction of the President. The mix-up in that order necessitating an amendment should have been the means of clearing up this whole matter and closing the incident, and that it did not is unanswerable.

Additional evidence adduced at this hearing from Army officers of high standing and experience, speaking both on and off the record, was to the effect that:

Had they been in command in Colonel Wimsatt's place, no such episode as the one involving Major Denton would have taken place. Colonel Wimsatt displayed a very definite persecution complex after returning from his isolation on an ice cap, resulting from an airplane crash a few months previous to the arrival of Major Denton. The general opinion was that he was "ice happy", a colloquialism meaning mentally disturbed. Subsequent to Colonel Wimsatt's return from the ice cap the number of courts martial of men of rank and file for minor offenses became excessive. When Colonel Smith took command after the removal of Colonel Wimsatt, he promptly freed a number of soldiers so persecuted.

It is significant, in the Committee's opinion, that the Army did not find it convenient to grant Major Denton's request to have as his defense counsel Captain John C. Cook, but, on the other hand, it assigned a special officer from the Judge Advocate General's Office in Washington to Mitchel Field to prosecute Major Denton.

Colonel Wimsatt had admitted that the orders were confused and Major Denton did not understand why he was sent to Greenland in the first place since he was a technical inspector of two years' experience.

Conclusion

It is the opinion of the Committee that the evidence adduced at the trial of Major Denton, at the hearing, and as the result of the investigations shows that a serious miscarriage of justice has occurred in the verdict and penalty against him. It is also the firm belief of the Committee that it is unnecessary categorically to enumerate all of the points which contribute to this view as they are fully set forth in the foregoing report. There is, however, one outstanding point which in itself leaves no doubt that an error has been committed, and that is substantiated by the original request for the issuance of orders to Major Denton, for the reasons that the Army Air Forces requested the Adjutant General's Office to assign Major Denton to Greenland as Post Commander, with instructions to assume command upon arrival at his destination; that shortly thereafter, and before the orders had been prepared, Lt. Col. J.H. Dailey, Chief of the Overseas Assignment Section of The Adjutant General's Office, received a telephone message from the Army Air Forces stating that as Major Denton would be ranked by an officer at that particular post, previously designated as being at the point of destination, it would be advisable to have the orders issued "by direction of the President."

The inevitable conclusion from this is that it was a particular post to which it was intended that Major Denton should be assigned; that such post was particularized in two ways; first, by being the one at which an officer outranked Major Denton, and second, by being the post at the point of destination. The logical conclusion is that it was intended by the original request from the Army Air Forces that Major Denton should be assigned to that particular post and no other, and should take command upon his

arrival. This is borne out by the fact that there was no other post at the point of destination and that there was an officer there who ranked Major Denton.

Recommendation

It is the Committee's belief that in the trial of Major Denton there was clearly a miscarriage of justice and the Committee respectfully recommends that the verdict and sentence of the court martial be disapproved by the President and that Major Denton be restored to his former status.

/s/ CARL T. DURHAM
Carl T. Durham
Chairman, Special Committee

/s/ NAME ILLEGIBLE

/s/ NAME ILLEGAIBLE

/s/ c NAME ILLEGIBLE

/s/ A.J. MAY
A.J. May
Chairman, Committee on Military Affairs